IN THE SENIOR JUDGE'S COURT OF THE SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA

Appeal No.7 of 1998
Criminal Case No. 269 of 1998

Coram: The Hon Mr Justice R J D LIVESEY, Senior Judge
The Hon Mr Justice J I MURCHIE DL, Deputy Senior Judge
The Hon Mr Justice B DUCKWORTH DL, Deputy Senior Judge

David MURPHY

Appellant

v.

The Queen

Respondent

Erotocritou with Katsikides for the Appellant
Hadjiconstantas for the Respondent

24 March, 1999

Judgment delivered by Mr Justice R J D LIVESEY, Senior Judge

JUDGMENT

This is an appeal by David Murphy against his conviction on the 11th December, 1998 in this Court of unintentionally causing the death of another person by a reckless act, contrary to Section 210 of the Criminal Code, CAP. 154 of the Laws of Cyprus.

The conviction arises out of a road traffic accident which occurred on the 8th February 1998 when a Toyota motor car driven by the appellant was in collision with the rear of an Isuzu pick-up truck driven by Stavros Hadjikkos which was thereby propelled across the road and across the path of a motor cycle being driven by Flying Officer Collier who was killed as a result of this collision.

The grounds of appeal are:

1. that the conviction was unreasonable and not justified by the evidence;
2. that the Judgment was not adequately reasoned;
3. that the learned Judge applied the law wrongly;
4. that the learned Judge failed to sum up the contradictions between the prosecution witnesses and, finally
5. that the learned Judge undermined the Defence by the frequency of his interruptions.

We say immediately that we have been greatly assisted by the lucid and able arguments advanced to us by Mr Erotocritou and Mr Hadjiconstantas.

Having studied the transcript and the Judgment, we can find no criticism of the findings of the learned Judge whose findings of fact were based upon evidence which he had heard and accepted. He saw and heard the witnesses and the findings of fact were a matter for him and cannot be disturbed unless they are without foundation in the evidence.

In our judgment the appellant in this case is faced with three difficulties:

Firstly, the question of speed: on this aspect the learned Judge had regard and accepted the evidence of Mrs Vryonidou whose car was overtaken by the appellant prior to the accident at what she described as "a very high speed". She put her own speed at about 50 kilometres per hour and she was described by the learned Judge as being a wholly honest witness. She described how the car driven by the appellant continued over the brow of the hill on the wrong side of the road. We observe from page 131 of the evidence that the Judge had the considerable advantage of attending the scene of this accident. Accordingly he was able to apply his knowledge of the scene to the evidence of the witnesses.

The second difficulty which faces this appellant is the question of drink. Approximately one hour after the accident the appellant was found to have 51 microgrammes of alcohol per 100 millilitres of breath: the limit is 39. This figure translates into 115 milligrammes per 100 ml of blood. Further, the learned Judge found and held as a fact that the blood alcohol level would

have been higher at the time of the accident. The expert called by the appellant, Doctor Galatopoulos, conceded in cross-examination (page 216 of the transcript) that the level of 115 would have impaired the appellant's ability to react properly. We note that the appellant pleaded guilty to driving above the prescribed limit.

The third difficulty facing this appellant is the question of inattention. By his own admission the appellant allowed his attention to wander by turning and talking to his son at a time while covering the distance of some 110 metres to the eventual accident and travelling at what we have already indicated was found to be a very high speed.

In our judgment any one of these three factors taken on their own when proved would justify a conviction under Section 210.

Much time was taken up by hearing the evidence of experts putting forward calculations, times, distances and routes taken by the various vehicles after the accident. The defendant's expert acted upon the basis of the plan drawn by the Prosecution witness together with the appellant's account of what had happened as given to him. This had at least one marked deficiency as the defendant's expert was not informed of the crucial factor as to the amount of drink taken. We find no valid criticism as to the Court's finding in relation to the value of the evidence given by these experts nor do we see any force in the complaint made by Counsel for the appellant that the Judge failed to deal with any contradictions disclosed in the evidence of the prosecution witnesses. We find that the thorough analysis of the summing up put forward by Mr Hadjiconstantas demonstrates to our complete satisfaction that this was a structured Judgment which cannot in any way be faulted.

The appellant seeks to criticise the learned Judge for wrongly applying the law. At the foot of page 1 of the Judgment, the Judge correctly stated the test to be that as defined in the House of Lords case of **Lawrence** which is adopted into the law of the Republic on the authority of **Petrou, Criminal Appeal 5868.** Accordingly the Court had to ask itself whether by the standards of a reasonable motorist the appellant's conduct caused an obvious and serious risk of harm and whether on the facts it was proved that he either deliberately took that risk or at the least failed to give any thought to the consequences of his behaviour.

On a patient review of the facts of this case, this Court is unanimously satisfied that the appellant's conduct and acts on the day in question were reckless, rash and dangerous and, unless there was anything else, this would suffice to dispose of this appeal.

However, a new ground of appeal for which we gave leave yesterday complains of the Judge's interruptions which are said to have undermined the Defence. We were given eighteen examples of such interruptions and we remind ourselves that there was no jury in this case and the Judge is quite entitled to restrain unnecessary and prolix cross-examination. We have read the examples relied upon to see if this ground is borne out and we have been unable to find anything calculated to undermine or deflect the Defence Counsel who maintained his client's case with tenacity and with thoroughness over the seven days during which this trial lasted.

We accept that any interruptions disclosed in the transcript were even-handed and were in no way similar to those circumstances appertaining in the jury trial of **R. v. Sharp (1993) 3 All E.R. page 225.**

Accordingly this appeal is dismissed and such is the Judgment of this Court.

Murchie DSJ: I agree.

Duckworth DSJ: So do I. Nothing to add.

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Livesey S.J: Are you asking for leave to appeal against sentence out of time? We do note and I have read the evidence which was put before the learned Judge on behalf of the Appellant by the Officer in charge.

Erotocritou: Sorry?

Livesey S J: We have read it.

Erotocritou: Oh, you have read it?

Livesey S J: Yes, we have, although it's not part of the Appeal against conviction. We have read it as part of the transcript.

Erotocritou: My Lords, I believe that when you have read the document you referred to just now, I do not think that in that document is the extent of the losses of the - (sentence not finished).

Livesey S J: No I don't think they do but I am speaking personally; I knew perfectly well what the extent was.

Erotocritou: Well, I mean if Your Lordships feel - because the only thing that I have in mind now is that this man will lose £125.000.

Livesey S.J: Yes.

Erotocritou: I mean if Your Lordships feel that that was in your mind as well, and I don't want to waste any more time to apply now for leave to appeal on ground of sentence. The problem as I see it now is really devastating on the accused and taking into consideration that he has already served four months nearly and so on I feel it may be better if we give it some consideration and I am wondering whether I can get leave to appeal on the sentence. Also My Lords I have a witness here who will give evidence about this matter.

Murchie DSJ: Is it Fl.Lt. Shatford?

Fl.Lt.Shatford: It is.

Murchie DSJ: Yes, he gave impressive evidence before the learned Judge of the details of the loss of the job and the pension etc.

Erotocritou: And the amount as well?

Murchie DSJ: Not the amount but we are all familiar in the United Kingdom with cases of servicemen who come before the civilian courts not infrequently.

Duckworth DSJ: Is it possible for Fl.Lt. Shartford now to give any indication of what view the higher authority has formed in the intervening three months? I am looking at

page 10 of the sentencing observations - Fl. Lt. Shatford says that a defendant who goes to prison will not, save in special circumstances, be retained in the Armed Forces. The final decision rests with the Ministry of Defence and I am wondering if any view has been formed about that?

Erotocritou: Well, as I understand My Lords, and I stand corrected by the Officer who is here he has already been dismissed or he is in the process of being dismissed, but the Officer is here who can give – (sentence not finished)

Livesey S.J: If you would like to ask the Officer Mr Erotocritou we will, of course, take your word for what he says.

Erotocritou to Fl.Lt Shatford: What is the position?

Fl.Lt.Shatford: The decision on Cpl. Murphy has been made and when I gave my initial statement it was a probability that he would be discharged. Decision has been made: he will be discharged.

Duckworth DSJ: And that means that he loses any pension entitlement that he has accrued to date?

Fl. Lt. Shatford: That's correct My Lord. If he was allowed to serve until he completed his 22 years engagement he would receive immediate pension on discharge. If he is discharged on completion of his sentence which he has now been told he will then he will lose that immediate pension and he will lose two thirds of his gratuity. We calculated that at approximately £144.000 in financial loss. So, apart from his job he will also lose his house of course, because he is accommodated by the MOD, and his family will thereby be effected by that as well.

Duckworth DSJ: But to an extent that situation is now being pre-empted by MOD's decision to sack him.

Fl. Lt.Shatford: Yes. Well, he is sacked the day he leaves prison. The effect on him himself and the family start on that date.

Duckworth DSJ: Yes. So, I mean if we were to – I am only thinking aloud at the moment – but even if this Court were to review sentence and impose a lesser penalty the dye is cast.

Fl. Lt. Shatford: As presently it says My Lord, a suspended sentence or a custodial sentence is discharge from the Royal Air Force. It would have to be a sentence of a lesser nature.

Duckworth DSJ: A non-custodial sentence.

Fl.Lt.Shatford: A non-custodial sentence.

Livesey S J: And of course the same applies in the Army?

Fl.Lt. Shatford: Yes, I am not familiar with the Army Rules –

Livesey S J: Well, it does.

Fl.Lt. Shatford: But I believe there are some circumstances where a soldier would not be discharged having done a custodial sentence.

Livesey S J: But of course it's subject to a higher authority.

Fl.Lt. Shatford: Of course.

Livesey S J: Yes. Well, we are very grateful for your assistance. We note that the dye is cast and accordingly I am obliged to dismiss the Appeal against sentence and I think it would be as well for the Appellant to know that the going rate for an offence such as this in the United Kingdom with a perfectly good character would start at about three to four years and accordingly, of course, I know that the maximum penalty here is only two - (sentence not finished)

Erotocritou: It's much lower I dare say.

Livesey S J: Very much lower I know.

Counsel for the Appellant addresses Court out of record.

Livesey S J: Well, Mr Erotocritou thank you very much for your help.

R J D LIVESEY
Senior Judge

B R DUCKWORTH
Deputy Senior Judge

J I MURCHIE
Deputy Senior Judge